

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**DIXIE ELECTRIC MEMBERSHIP
CORPORATION,**

Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD

Respondent

CASE NO.: _____

**PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

Dixie Electric Membership Corporation (hereafter “DEMCO” or “Petitioner”) hereby petitions the Court for review of the entire final Decision and Order of the National Labor Relations Board (“NLRB” or “Respondent”) entered on November 19, 2014 in Cases 15-CA-019954 and 15-UC-061496, which adopted the recommended Order of the administrative law judge (with modifications to include compensation of employees for adverse tax consequences , if any, and notification to Social Security Administration regarding allocation of backpay awards to the appropriate calendar quarters for each employee, and substitution of an attached notice for that of the administrative law judge) and, affirmed the conclusions of the administrative law judge that DEMCO, the employer, engaged in unfair labor practices by modifying the scope of the bargaining unit by removing positions which DEMCO maintains are supervisory. In reaching its decision, the NLRB incorrectly determined that DEMCO’s decision to remove the positions from the unit was presented as a fait accompli, that the contractual waiver of bargaining was not enforceable, and that the Union’s inaction and past practice did not constitute a waiver.

Furthermore, the NLRB made the improper subjective determination that DEMCO's Unit

Clarification Petition was not timely filed and upheld its dismissal. DEMCO respectfully requests that the Court vacate and deny enforcement in its entirety of this final Decision and Order.

This Petition for Review, which also includes the underlying representation proceeding and certification of the Union as the bargaining representatives of its system operators, is brought pursuant to Federal Rule of Appellate Procedure 15. Venue is proper in this Court pursuant to 29 U.S.C. 160(f) because the alleged unfair labor practices and underlying certification issues all occurred exclusively in Louisiana at DEMCO's Louisiana facility, where DEMCO resides and conducts business.

Respectfully submitted,

TAYLOR, PORTER, BROOKS & PHILLIPS LLP.

By:



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-CERTIFICATE-

In accordance with Federal Rule of Appellate Procedure 15(c), undersigned counsel certifies that a copy of this Petition for Review has been served upon:

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by United States mail, postage prepaid, this 23rd day of January, 2015.


M. Lenore Feeney

NUMBER 1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Dixie Electric Membership Corporation and International Brotherhood of Electrical Workers, Local Union 767. Cases 15-CA-019954 and 15-UC-061496

November 19, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON AND SCHIFFER

On August 31, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 120. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Fifth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings and conclusions, to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 120, which is incorporated herein by reference,¹ we adopt judge's recommended Order, as modified herein.²

¹ Member Johnson concurs that the Respondent violated Sec. 8(a)(5) by changing the scope of the unit without the Union's consent when it removed the chief system operator (CSO) and system operators (SOs) from the unit. See *Arizona Electric Power Cooperative, Inc.*, 250 NLRB 1132 (1980) (finding that, independent of whether dispatchers were supervisors, utility unlawfully removed dispatchers from unit without union's consent during term of contract). Because it would not materially affect the remedy, Member Johnson finds it unnecessary to decide whether this conduct also violated Sec. 8(a)(5) as a unilateral transfer of unit work or whether the Union waived its right to bargain over any transfer.

In concerning in the finding that the UC petition was untimely filed, Member Johnson notes that he would not find the 4-month delay here

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dixie Electric Membership Corporation, Baton Rouge, Louisiana, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(f) and reletter the subsequent paragraphs.

"(f) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 19, 2014

Kent Y. Hirozawa, Member

Harry I. Johnson III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

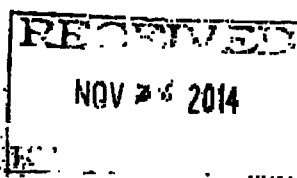
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

unreasonable if the parties had agreed to this amount of time in their side agreement. In the absence of an agreed-upon timeframe, however, the Respondent was required to file its petition "shortly after the contract was executed." *WYYS-TV*, 239 NLRB 170, 171 (1978). The cases cited by the judge demonstrate that the gap here is beyond what the Board has allowed.

Finally, Member Johnson notes that the Respondent's citation of *Gratlot Community Hosp. v. NLRB*, 51 F.3d 1255, 1262 (6th Cir.1995), is actually a citation to the dissenting opinion, and thus not an accurate statement of the law. Rule 102.46(e)(3) of the Board's Rules and Regulations requires that parties "clearly" present the facts and law in support of their argument; the Respondent's misleading citation to *Gratlot* fails to meet this standard.

² We shall modify the judge's recommended Order in accordance with our recent decision in *Don Chaves LLC d/b/a Tortillas Don Chaves*, 361 NLRB No. 10 (2014). We shall also substitute new notices to conform to the modified Order and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).



The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT remove chief systems operators and systems operators from the bargaining unit represented by the International Brotherhood of Electrical Workers, Local Union 767, without the Union's consent.

WE WILL NOT fail and refuse to recognize the Union as the exclusive collective-bargaining representative of our employees holding chief systems operator and systems operator positions and **WE WILL NOT** fail and refuse to apply the terms of the existing collective-bargaining agreement to those employees.

WE WILL NOT transfer work from unit employees to nonunit employees, without first affording the Union notice and an opportunity to bargain over the transfer decision and its effects.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our December 1, 2010 elimination of the bargaining unit chief systems operator and systems operator positions, related reclassification of these jobs as nonunit positions, and consequent transfer of the work performed by these positions outside the unit.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees occupying the chief systems operator and systems operator positions, and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

WE WILL apply the terms of the existing collective-bargaining agreement between Dixie Electric Member-

ship Corporation and the Union to employees occupying the chief systems operator and systems operator positions, in the absence of any agreement to the contrary. However, the Board has not authorized or required us to withdraw or eliminate any wage increase or other improved benefits or terms or conditions of employment, which may have already been afforded to the chief systems operator and systems operator positions, as compared to the wages, benefits, and terms, or conditions of employment of bargaining unit employees.

WE WILL notify and, upon request, bargain with the Union in good faith before transferring any work from unit employees to nonunit employees.

WE WILL make whole any unit employees for any loss of wages and benefits they may have suffered as a result of our unlawful actions and, to the extent the chief systems operator and systems operators lost coverage for various benefits provided under the collective-bargaining agreement, **WE WILL** reimburse them for any expenses incurred as a result of their lapse in such coverage.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and **WE WILL** file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

DIXIE ELECTRIC MEMBERSHIP CORPORATION

The Board's decision can be found at www.nlr.gov/case/15-CA-019254 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



NUMBER 2

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Dixie Electric Membership Corporation and International Brotherhood of Electrical Workers, Local Union 767. Cases 15-CA-019954 and 15-UC-061496

August 31, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On January 24, 2012, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dixie Electric Membership Corporation, Baton Rouge, Louisiana, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Dated, Washington, D.C. August 31, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Beauford D. Pines, Esq., for the Acting General Counsel.
David J. Shelby, II, and M. Lenore Feeney, Esqs. (Taylor, Porter, Brooks & Phillips L.L.P.), for the Respondent.*

¹ Member Hayes agrees with the judge and his colleagues that the Respondent altered the scope of the bargaining unit in violation of Sec. 8(a)(5) when it eliminated the chief system operator (CSO) and system operator (SO) classifications and converted the incumbents in those classifications to nonunit positions. He finds it unnecessary to pass on the judge's alternative conclusion that the Respondent violated Sec. 8(a)(5) by unilaterally transferring unit work from the bargaining unit.

Nora Leyland, Esq. (Sherman, Dunn, Cohen, Leifer & Yellig P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Baton Rouge, Louisiana, on October 17 and 18, 2011. The original charge in this proceeding was filed by the International Brotherhood of Electrical Workers, Local Union 767 (the Union) on March 7, 2011. The Union represents a bargaining unit of workers (the unit) employed by Dixie Electric Membership Corporation (DEMCO or Respondent) at its Baton Rouge, Louisiana facility.¹ On June 23, 2011, a complaint issued, which alleged that DEMCO violated Section 8(a)(1) and (5), and 8(d) of the National Labor Relations Act (the Act) by unilaterally removing the Chief Systems Operator (CSO) and Systems Operator (SO) positions from the unit. On July 6, 2011, DEMCO filed an answer, which, inter alia: denied any unlawful action; averred that the CSO and SO positions at issue were supervisory; and contended that these matters should be resolved through a unit clarification (UC) proceeding. On July 21, 2011, DEMCO filed a UC petition concerning the positions. On August 19, 2011, an order consolidating the complaint with the UC petition issued.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, DEMCO, a corporation, with an office and place of business in Baton Rouge, Louisiana (the facility), has operated an electrical power cooperative, which provides electricity to residential and commercial consumers. Annually, in conducting such operations, it derives gross revenues exceeding \$500,000, and purchases and receives at the facility goods and supplies valued over \$50,000 directly from points located outside of the State of Louisiana. As a result, it admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The central facts involved in this litigation are essentially undisputed. DEMCO and the Union (the parties) have enjoyed a longstanding collective-bargaining relationship, which has spanned over 40 years. They have, as a result, been signatories to multiple contracts, including the February 28, 2007, through February 28, 2011 collective-bargaining agreement (the 07-11 CBA). (GC Exh. 3). The unit covered under the 07-11 CBA expressly included the CSO and SO positions at issue herein.² (Id. (Exh. A)).

¹ There are approximately 160 employees in the unit.

² The unit described by the 07-11 CBA also included the following classifications: helper; lineman; serviceman; cable locator; outage customer service clerk; auto mechanic; street light maintenance;

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

CSO and SO employees are assigned to the control room. They are essentially dispatchers, who perform the following major duties: monitoring and controlling the distribution electric system through various computer applications and other methods; interacting with customers concerning power outages and complaints; dispatching and assigning field personnel to address outages and other problems; communicating with DEMCO and outside personnel regarding load transfers and other power supply issues; analyzing outages and prioritizing work assignments; and maintaining accurate logs and records. (GC Exhs. 8-9).

B. November 17, 2010 Meeting³

On November 17, DEMCO's Chief Executive Officer John Vranic met with Union Business Manager Floyd Pourciau to discuss various labor relations matters. At this meeting, Vranic advised Pourciau that DEMCO intended to remove the CSO and SO positions from the unit, and transfer the positions and their associated work outside of the unit. This decision was memorialized in a letter that was simultaneously distributed to Pourciau, which provided:

[E]ffective December 1, . . . the . . . Systems Operator and Chief Systems Operator . . . will be eliminated and new management positions having the same titles will be utilized . . . Existing employees will be promoted to the new management positions. . . .

(GC Exh. 6). DEMCO also disseminated letters to its incumbent CSO and SO employees, which reiterated its decision to remove their positions from the unit. (GC Exhs. 7-9).

Ronald May, Vice President of Engineering and Operations, testified that he met with incumbent CSO and SO employees to advise them about their reclassification approximately a week before DEMCO notified Pourciau. He described the following meeting:

I had a face-to-face meeting to make them aware of the Company's direction . . . and that they would be receiving a letter in the mail, indicating that their position was going to be removed from the Union, and they would become management employees . . .⁴

(Tr. 62-63).

Pourciau testified that, after learning that DEMCO intended to remove the positions from the unit, he and Vranic engaged in the following exchange:

I said . . . we're going to have to file Labor Board charges. And he said, yes, I understand perfectly; it's just business. I said okay.

(Tr. 127). He described Vranic's announcement as a "done deal," which was not presented as an invitation to bargain

warehouseman; electronic technician; apparatus technician; meter technician; engineering assistant; engineering designer; mapping designer; meter reader; accounting clerk; work order technician; consumer rep.; purchasing clerk; credit rep.; connector; and maintenance technician.

³ All dates herein are in 2010, unless otherwise indicated.

⁴ New CSO and SO job descriptions were drafted in late October.

about a potential removal of positions. He added that Vranic was resolute in describing DEMCO's decision to transfer the positions outside of the unit. He noted that DEMCO never solicited his input or proposals regarding this matter. He indicated that, although DEMCO previously sought to remove these positions from the unit in 2005 and 2007, it always initially consulted with the Union and abandoned its pursuit in response to the Union's dissent.

Vranic affirmed that he advised Pourciau about DEMCO's decision to remove the positions from the unit on November 17. He testified that Pourciau responded that he would advise the Union's hierarchy. He reported that the Union never grieved this matter, and averred that DEMCO never expressly refused to bargain. He contended that he was privileged to eliminate these positions from the unit under Article II, Management Rights of the 07-11 CBA, which provided that:

Company retains all of the rights and functions of management, except to the extent that they are expressly and specifically modified or limited by the written, specific provisions of this Agreement. Some of the rights retained by Company include, but are not limited to, the right, power, and authority to . . . establish job classifications, and discontinue job classifications; to assign and reassign the work to be performed by employees or classifications of employees as the Company may deem necessary to expediency

(GC Exh. 3).

Vranic also asserted that the parties had an established practice, which permitted DEMCO to convert unit positions into management positions, without the Union's consent. He explained that, in 2001, the Union acquiesced to DEMCO's decision to convert a unit position into a management position. He recalled that this position was held by Bobby Cantu, a switchboard operator.⁵

May conceded that DEMCO never bargained with the Union, or sought its consent, concerning its removal of the CSO and SO positions. He added that, since 2007, besides the CSO and SO positions at issue herein, DEMCO filled 9 management positions, which were outside of the unit. See (R. Exh. 1).

C. DEMCO's Rationale Behind Removing the Unit Positions

Vranic testified that he decided to remove the contested positions from the unit because they were performing a supervisory role by, "dispatching people . . . and controlling . . . resources." (Tr. 185). He stated that the growing complexity of the CSO and SO positions warranted this conversion. May testified that he was involved in the decision to remove these positions from the unit, which he recalled occurring in August.⁶

⁵ He indicated that the Union was aware of this transition, although he acknowledged that his belief was not based upon direct knowledge. Specifically, he stated, "I believe, I really don't know, but I think Mr. Henry would have let someone know that we're moving them." (Tr. 193); see also (GC Exh. 22).

⁶ May added that, although the decision was made in August, DEMCO did not notify affected employees until multiple months thereafter, due to competing business priorities.

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D. CSO and SO Duties After December 1

May indicated that, following the removal of the positions from the unit, CSO and SO employees continued to perform the majority of the same duties that they previously performed, and continued to work out of the control room. He stated that that DEMCO did not hire new employees to cover their former unit work, and described the following transition:

[T]heir job responsibilities were vastly similar, ... real similar. I mean they are charged with operating the system. What's different is that they now have the authority and direction to interact with other managers to provide input on various levels of problems that they now have in the field. ... So the technical aspect of their job remained the same. They still were able to process an outage, but, they were doing these management functions prior to December 1, as well as after December 1. The Company wanted to make clear that these are management functions, and they belong on the management side....

(Tr. 66).

E. Contract Negotiations

In anticipation of the expiration of the 07-11 CBA, the parties commenced bargaining for a successor agreement. Their negotiations resulted in a new contract, which ran from February 28, 2011, through February 28, 2015 (the 11-15 CBA). See (GC Exhs. 14-16, 18).

Although the parties were unable to resolve their CSO and SO dispute during bargaining, they wisely agreed to table this matter and not stifle negotiations. As a result, on February 7, 2011, prior to executing the 11-15 CBA, they reached the following agreement:

The Union recognizes that the company has asserted that the Dispatchers [i.e. CSO and SO positions] are no longer covered under the ... collective bargaining agreement....

[T]he purpose of this document is for the parties to express their agreement that the Union has not agreed ... to relinquish representation of the dispatchers...

[T]he Union retains all rights held previously in regard to representation of DEMCO employees.

If at such time as a final legal determination, ... is made on any charge or suit as to whether System Operators are covered under the ... collective bargaining agreement, then the parties agree to abide by ... [this] determination.⁷

(GC Exh. 16).

III. ANALYSIS

Counsel for the Acting General Counsel contends that DEMCO violated Section 8(a)(5) in two ways. First, he contends that the elimination of the unit CSO and SO positions violated Section 8(a)(5) because DEMCO altered the

scope of the unit covered by the 07-11 CBA, without the Union's consent. Second, he avers that, even if the Union's consent was not required (i.e. DEMCO did not alter the scope of the unit), it nevertheless violated Section 8(a)(5) because it failed to grant the Union an opportunity to bargain over its decision to transfer work outside the unit and its effects, prior to implementation. As will be discussed, both theories are compelling.

A. Alteration of the Unit's Scope⁸

DEMCO violated Section 8(a)(5) and (d), when it modified the scope of the unit covered by the 07-11 CBA, without the Union's consent. It is well established that, once a specific title is included within a bargaining unit by either consent or Board action, an employer cannot remove this title from the unit, without the union's consent or the Board's imprimatur. See, e.g. *Solutia, Inc.*, 357 NLRB No. 15 (2011); *Wackenhut Corp.*, 345 NLRB 850, 855 (2005); *Beverly Enterprises*, 341 NLRB 296, 307 (2004); *Hill-Rom Co.*, 957 F.2d 454, 457 (7th Cir. 1992).

DEMCO unlawfully modified the unit's scope, when it eliminated the unit CSO and SO positions, and converted the incumbents to nonunit workers. It is undisputed that: the positions were covered by the 07-11 CBA; on December 1, these positions were removed and transferred outside of the unit; following such removal, the same employees continued to perform essentially the same dispatching duties at the same locale; and DEMCO failed to secure the Union's or Board's consent, before such removal. I find that, under such circumstances, DEMCO unlawfully altered the unit's scope.⁹

In its defense, DEMCO contends that it was permitted to alter the unit's scope because the disputed positions were supervisory. Even assuming arguendo that these employees were supervisory, I find that this argument lacks merit. The Board has held that, where parties to a collective-bargaining relationship have voluntarily agreed to include supervisors in a bargaining unit, it will order the application of the terms of the collective-bargaining agreement to such supervisors. See, e.g., *Wackenhut Corp.*, supra at 852-853; *Mt. Sinai Hospital*, supra at fn. 2; *Gratiot Community Hospital*, 312 NLRB 1075 fn. 2 (1993); *Arizona Electric Power*, 250 NLRB 1132 (1961).

⁸ This allegation is listed under pars. 9-13 of the complaint.

⁹ See, e.g., *Wackenhut Corp.*, supra at 852-853 (company unlawfully altered unit's scope by: eliminating sergeant positions and removing their work from the unit; and by eliminating CAS/SAS operator positions from the unit and reclassifying them to nonunit, supervisory, lieutenants); *Beverly Enterprises*, supra (unilateral removal of unit rehabilitation aides, who subsequently continued to perform the same duties outside unit); *Holy Cross Hospital*, 319 NLRB 1361 (1995) (elimination of unit house supervisor position, while transferring such work outside of the unit); *Mt. Sinai Hospital*, 331 NLRB 895 fn. 2, and 907-908 (2000), enfd. 8 Fed. Appx. 111 (2d Cir. 2001) (unpublished) (unilaterally reclassifying unit sous chef employees to nonunit assistant culinary manager positions); *Facet Enterprises*, 290 NLRB 152 (1988), enfd. in relevant part 907 F.2d 963, 975 (10th Cir. 1990). But cf. *Hampton House*, 317 NLRB 1005 (1995) (where employer transferred certain LPN positions outside of the unit, while leaving other LPN positions within the unit, it did not alter scope of the unit).

⁷ Pourciau and Glenn Brannen, the Union's International Representative, credibly testified that the Union would not execute the 11-15 CBA, without first signing the above-described side agreement.

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B. Unilateral Transfer of Unit Work Outside of Unit¹⁰

Even assuming arguendo that DEMCO did not modify the scope of the unit when it eliminated the unit CSO and SO titles, I nevertheless find that it violated Section 8(a)(5), by unilaterally transferring such work outside of the unit without affording the Union an opportunity to negotiate over the decision itself or its effects. In this regard, the Board has held that:

When an employer promotes an employee to a supervisory position and the new supervisor continues to perform former bargaining unit work, . . . the work is removed from the bargaining unit. That is a change in the bargaining unit's terms and conditions of employment, giving rise to the employer's bargaining obligation under Section 8(d) of the Act. In those circumstances, the employer must bargain with the union in good faith and may unilaterally change the bargaining unit's work only after a lawful impasse.

Hampton House, supra at 1005. DEMCO's decision to transfer unit work to nonunit personnel, and the effects of this decision, were, therefore, mandatory subjects of bargaining. *Id.*; see also *Soluta, Inc.*, supra (transfer of unit work to non-unit personnel at another facility is a mandatory subject of bargaining).

DEMCO contends that, even if its decision to transfer the unit CSO and SO work outside of the unit was a mandatory subject of bargaining, the Union waived its right to bargain over this matter. It makes three arguments in this regard: (1) the Union's failure to request bargaining over this matter constituted a waiver of its bargaining rights; (2) the Union expressly waived its right to bargain over this issue in the 07-11 CBA; and (3) the Union's past acquiescence to its transfer of a unit switchboard operator position outside of the unit resulted in a waiver of its bargaining-rights herein. These arguments, as will be discussed, are invalid.

1. Waiver by inaction

DEMCO's contention that the Union's failure to request bargaining concerning its decision to remove the disputed positions from the unit resulted in a waiver of its bargaining rights is without merit. Although it is undisputed that the Union never sought bargaining over this matter, DEMCO's decision to transfer the CSO and SO work outside of the unit was presented as a fait accompli, which relieved the Union of its ordinary obligation to request bargaining. DEMCO has the burden to show that the Union received actual, or constructive, notice of its proposed changes. *Catalina Pacific Concrete Co.*, 330 NLRB 144 (1999). In order to show that the Union waived its bargaining rights, it must also be shown that it was presented with timely and meaningful notice. *Metropolitan Teletronics*, 279 NLRB 957 (1986).¹¹ Where this has not occurred, a union's bargaining rights will not be waived. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *S & I Transportation, Inc.*, 311 NLRB 1388, 1390

(1993). A union, moreover, has no duty to request bargaining, where management resolutely communicates that its decision is a fait accompli. See, e.g., *Asher Candy*, 348 NLRB 993, 996 (2006); *Westinghouse Electric Corp.*, 313 NLRB 452, 453 (1993).

On November 17, DEMCO presented its decision to transfer the CSO and SO work outside of the unit as a fait accompli, which relieved the Union of its ordinary obligation to request bargaining. First, May admitted that DEMCO made its decision in August, i.e. 3 months before the Union received notice. Second, May acknowledged that he told CSO and SO employees about their impending transfer a week before the Union was informed. Finally, the letter that notified Pourciau about DEMCO's intention to remove the positions from the unit was not phrased as a bargaining invitation or proposal; this letter was, instead, definitively phrased as a final decision. See (GC Exh. 6) ("[E]ffective December 1, . . . the . . . Systems Operator and Chief Systems Operator . . . will be eliminated and new management positions having the same titles will be utilized . . . [Emphasis added]."). Finally, Pourciau credibly testified that Vranic resolutely communicated a final decision to eliminate the positions. Under such circumstances, DEMCO decision was presented to Pourciau as a fait accompli. The Union, therefore, did not waive its rights by failing to request bargaining.

2. Waiver by express agreement

DEMCO's assertion that the Union expressly waived its bargaining rights concerning the disputed positions is invalid. Specifically, it avers that, under Article 11, Management Rights of the 07-11 CBA, the Union expressly waived its bargaining rights regarding the transfer of the CSO and SO positions outside of the unit. A waiver of statutory bargaining rights must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Board, in applying this test, has held that, before a waiver can be found; a contract clause must specifically include the subject at issue; bargaining history must show that the matter was fully discussed during negotiations; and the Union consciously yielded its interest in the subject. *Johnson-Baleman Co.*, 295 NLRB 180, 184-188 (1989).

Article 11, Management Rights, of the 07-11 CBA is not a clear and unmistakable waiver of the Union's right to bargain over unit work being transferred outside of the unit. Although Article 11 states that DEMCO retains the right to "establish job[s] . . . and discontinue job classifications" and "assign and reassign . . . work," it conspicuously fails to indicate whether these rights are concisely limited to intra-unit work transfers, or broadly encompass extra-unit work transfers. Thus, this language is, in isolation, ambiguous concerning DEMCO's right to transfer work outside of the unit. Moreover, DEMCO failed to present any bargaining history, which demonstrated that its construction of this ambiguous language was accurate (i.e. the Union consciously yielded its right to bargain over transfers of work outside the unit during prior negotiations). This language, as a result, does not constitute a clear and unmistakable waiver of the Union's right to bargain over this matter. See *Regal Cinemas*, 334 NLRB 304, 313-315 (2001), *enfd.* in relevant part 317 F.3d 300, 314 (D.C. Cir. 2003) (management-rights clause that expressly authorized employer to "change or eliminate existing . . . procedures or work" did not encompass employer's transfer of employees' work to managers).

¹⁰ This allegation is also listed under pars. 9-13 of the complaint.

¹¹ "An employer must inform a union of its proposals under circumstances which at least afford a reasonable opportunity for counter arguments or proposals." *Defiance Hospital*, 330 NLRB 492 (2000), citing *NLRB v. Centro*, 954 F.2d 366 (6th Cir. 1992).

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3. Waiver by past practice

DEMCO's argument that the Union's acquiescence to its transfer of Cantu's unit switchboard position outside of the unit constitutes a waiver of its bargaining rights regarding the CSO and SO positions is flawed. The Union's acquiescence to an isolated transfer of work outside the unit does not constitute a waiver of its right to bargain over all succeeding work transfers. See *Regal Cinemas*, supra at 315; *Golgate-Palmolive Co.*, 323 NLRB 515, 516 (1997).

IV. UNIT CLARIFICATION

The UC petition is untimely. The petition was filed on July 21, 2011. It was filed during the term of the 11-15 CBA, which was executed between February 28 and March 22, 2011.¹²

Although clarification is generally not appropriate for upsetting an established practice of including a particular classification in a bargaining unit, a timely UC petition, "seeking to exclude a classification based on supervisory status may be processed even though the disputed classification has been historically included." *Goddard Riverside Community Center*, 351 NLRB 1234, 1235 (2007). In *St. Francis Hospital*, 282 NLRB 950 (1987), the Board described its UC petition timing requirements:

The Board generally declines to clarify bargaining units midway in the term of an existing collective-bargaining agreement that clearly defines the bargaining unit. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). To do otherwise, the Board has held, would be unnecessarily disruptive of an established bargaining relationship. *San Jose Mercury & San Jose News*, 200 NLRB 105 (1972); *Wallace-Murray*, ... In some limited circumstances, however, the Board finds the interests of stability are better served by entertaining a unit-clarification petition during the term of a contract. Thus, where the parties cannot agree on whether a disputed classification should be included in the unit but do not wish to press this issue at the expense of reaching an agreement, the Board will entertain a petition filed shortly after the contract is executed, absent an indication that the petitioner abandoned its request in exchange for some concession in negotiations. *WNYS-TV (WIXT)*, 239 NLRB 170 (1978); *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973).

Id. at 951 (emphasis added). Although, to date, the Board has not numerically defined a maximum limitation for the "shortly after the contract is executed" standard, its precedent remains illustrative. See, e.g., *St. Francis Hospital*, supra at 952 (UC petition filed 48 days after contract execution meets "shortly after" standard); *Goddard Riverside Community Center*, supra at 1236 (7 days suffices); *WNYS-TV (WIXT)*, supra at 170-171 (51 days suffices); *Baltimore Sun Co.*, 296 NLRB 1023, 1024 (1989) (79 days suffices).

¹² Although the parties surprisingly did not offer direct testimony on the exact date that the 11-15 CBA was executed, and the signatures on the 11-15 CBA are undated (see GC Exh. 15 at 35-36), I find that the contract was executed between February 28 (i.e. the effective date listed on the signature page (see GC Exh. 15 at 35)) and March 22, 2011 (i.e. the date listed on the contract's wage schedule (see GC Exh. 15 at Exh. A)).

For several reasons, I find that the instant UC petition is untimely.¹³ First, DEMCO failed to file its UC petition "shortly after" the 11-15 CBA was executed. Although it reserved its right to file a UC petition after bargaining concluded, and the 11-15 CBA was executed between February 28 and March 22, 2011, it then waited until July 21, 2011, to file the UC petition. Its filing, therefore, occurred between 121 and 143 days after execution. This 4-plus month filing delay does not satisfy the Board's "shortly after the contract was executed" standard.¹⁴ Second, DEMCO failed to offer a reasonable explanation for its filing delay. This omission further supports dismissal on timeliness grounds. Third, allowing DEMCO to file its UC petition would severely disrupt the parties' collective-bargaining relationship. Specifically, assuming arguendo that the CSO and SO employees are supervisory, allowing DEMCO to pursue a UC petition under these circumstances would permit it to unilaterally absolve its unfair labor practice liability by filing a UC petition.¹⁵ Processing the UC petition would, as a result, violate the Board's well-established policy of not permitting the parties to use the UC process in a manner that would disrupt their collective-bargaining relationship.¹⁶ See *Edison Sault Electric Co.*, 313 NLRB 753, 753 (1994) (holding that a UC petition was untimely filed, where consideration of the petition would "disrupt the parties' collective bargaining relationship."). The UC petition is, therefore, dismissed as untimely.¹⁷

CONCLUSIONS OF LAW

1. DEMCO is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

¹³ As a preliminary matter, I find that, in the February 7, 2011 agreement, DEMCO reserved its right to file a UC petition "shortly after" the 11-15 CBA was executed. See (GC Exh. 16); *WNYS-TV (WIXT)*, supra.

¹⁴ This duration widely surpasses the outer limits previously accepted by the Board.

¹⁵ Or put another way, allowing DEMCO to process a UC petition herein would frustrate the Board's remedial powers regarding the instant unfair labor practices. DEMCO's counsel acknowledges this judicial dilemma in his posthearing brief. See (R. Br. at 17 (stating that, "If this Court finds that the decision to remove operator positions from the bargaining unit ... was unlawful, then the classifications were only unlawfully removed from the bargaining unit for a period of three months, and any remedies ... will cover only a three month period of time.")).

¹⁶ To hold otherwise, would encourage similar employers to unilaterally alter their collective-bargaining units before contract negotiations commenced, when the parties' labor-management relationships are already keenly vulnerable, and then defend such unlawful conduct under the cover of a delayed UC petition. In the event that a subsequent unfair labor practice complaint issues. One would be hard pressed to argue that such a scenario would not be highly disruptive to the collective-bargaining process.

¹⁷ In dismissing the petition, I make no finding regarding whether the CSO and SO positions are actually supervisory. I do note, however, that DEMCO's position is likely undercut by the Board's recent holding that similar electric utility dispatchers are not supervisory. See *Energy Mississippi, Inc.*, 357 NLRB No. 178, at 8-9 (2011) (holding that, "transmission and distribution electric utility dispatchers are not supervisors and should continue to be included in the collective-bargaining unit.").

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3. The Union is the exclusive collective-bargaining representative of a unit of DEMCO's employees employed at its Baton Rouge, Louisiana facility, including chief systems operator, systems operator, and other classifications, as described by exhibit A of the parties' collective-bargaining agreement, which is effective from February 28, 2011, through February 28, 2015.

4. By unilaterally eliminating the chief systems operator and systems operator positions from the unit, and transferring such work outside of the unit, DEMCO has altered the scope of the unit without the Union's consent,¹⁸ and, additionally, has failed and refused to bargain in good faith with the Union regarding the decision to transfer such work from the unit, as well as the effects on unit employees associated with this decision,¹⁹ in violation of Section 8(a)(1) and (5) of the Act.

5. The unfair labor practice set forth above affects commerce within the meaning of Section 2(6) and (7) of the Act.

6. The unit clarification petition dated July 21, 2011 is dismissed as untimely.²⁰

REMEDY

Having found that DEMCO has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In order to restore the status quo ante, DEMCO shall be required to: rescind its December 1, 2010 removal of the unit CSO and SO positions and consequent transfer of the work performed by these positions outside of the unit; recognize the Union as the exclusive collective-bargaining representative of the employees occupying the CSO and SO positions; and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment. DEMCO shall also be required to apply the terms of the collective-bargaining agreement, effective February 28, 2011, through February 28, 2015, between the Union and DEMCO, to employees occupying the CSO and SO positions, in the absence of an agreement to the contrary. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment, which may have been afforded to the CSO and SO employees, as compared to the wages, benefits, and terms or conditions of employment of bargaining unit employees.

DEMCO shall also notify and, upon request, bargain in good faith with the Union before transferring any work from unit to nonunit employees. Although it does not appear from

the record herein that any CSO or SO employees suffered any economic loss as a consequence of DEMCO's actions, it is nevertheless ordered to make these unit employees whole, if it can be shown that they have suffered any loss of wages and benefits as a result of its unlawful actions. Backpay, if any is warranted herein, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), *enf. denied* on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). To the extent, if any, that CSO or SO employees lost coverage for various benefits provided under the collective-bargaining agreement, DEMCO shall reimburse them for any expenses incurred as a result of their lapse in coverage, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enf. mem.* 661 F.2d 940 (9th Cir. 1981).

DEMCO is further ordered to distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its bargaining unit employees, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²¹

ORDER

The Respondent, Dixie Electric Membership Corporation, Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Eliminating CSO and SO positions from the bargaining unit represented by the Union, without its consent.

b. Failing and refusing to recognize the Union as the exclusive collective-bargaining representative of employees occupying the CSO and SO positions, and failing to apply the terms of the existing collective-bargaining agreement to such employees.

c. Transferring work from unit employees to nonunit employees, without first affording the Union notice and an opportunity to bargain over the transfer decision and its effects.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Rescind the December 1, 2010 elimination of the unit CSO and SO positions, and consequent transfer of the work performed by such employees outside of the bargaining unit represented by the Union.

b. Recognize the Union as the exclusive collective-bargaining representative of the employees occupying the CSO and SO positions and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁸ This action also violated Section 8(d) of the Act.

¹⁹ This finding addresses Counsel for the Acting General Counsel's alternative theory of violation. As noted, even assuming arguendo that DEMCO did not modify the scope of the unit when it eliminated the unit CSO and SO titles without the Union's or Board's consent, it nevertheless violated Section 8(a)(5), by unilaterally transferring such work outside of the unit and failing to bargain with the Union regarding the decision itself and its effects. See *Mt. Sinai Hospital*, supra at fn. 2 ("Finally, we agree with the judge's alternative rationale . . . that even were the Respondent's unilateral change to constitute a transfer of unit work, rather than an alteration of the unit, the Respondent violated Sec. 8(a)(5) because there had been no agreement, impasse, or waiver.").

²⁰ The petition is dismissed without prejudice to DEMCO's right to re-file it at an appropriate later date. See *Arthur Logan Memorial Hospital*, 231 NLRB 778, 779 (1977).

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c. Apply the terms of the existing collective-bargaining agreement between the Union and DEMCO to employees occupying the nonunit CSO and SO positions, in the absence of any agreement to the contrary. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment, which may have been afforded to the CSO and SO employees, as compared to the wages, benefits, and terms, or conditions of employment of bargaining unit employees.

d. Notify and, upon request, bargain with the Union in good faith before transferring any work from unit employees to nonunit employees.

e. Make whole, in the manner described in the remedy portion of this decision, any unit employees for any loss of wages and benefits they may have suffered as a result of DEMCO's unlawful actions and, to the extent that CSO and SO employees lost coverage for various benefits provided under the collective-bargaining agreement, reimburse them for any expenses incurred as a result of their lapse of coverage.

f. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of any backpay or other remedial relief, which may be due under the terms of this Order.

g. Within 14 days after service by the Region, physically post at its Baton Rouge, Louisiana facility, and electronically distribute via email, intranet, internet, or other electronic means to its bargaining unit employees who were employed by the Respondent at the Baton Rouge, Louisiana facility at any time since December 1, 2010, copies of the attached notice marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be physically posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2010.

h. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the unit clarification petition dated July 21, 2011 is dismissed as untimely.

Dated, Washington, D.C. January 24, 2012

²² If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT remove chief systems operators and systems operators from the bargaining unit represented by the International Brotherhood of Electrical Workers, Local Union 767, without the Union's consent.

WE WILL NOT fail and refuse to recognize the Union as the exclusive collective-bargaining representative of our employees holding chief systems operator and systems operator positions and WE WILL NOT fail and refuse to apply the terms of the existing collective-bargaining agreement to those employees.

WE WILL NOT transfer work from unit employees to nonunit employees, without first affording the Union notice and an opportunity to bargain over the transfer decision and its effects.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our December 1, 2010 elimination of the bargaining unit chief systems operator and systems operator positions, related reclassification of these jobs as nonunit positions, and consequent transfer of the work performed by these positions outside the unit.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees occupying the chief systems operator and systems operator positions, and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

WE WILL apply the terms of the existing collective-bargaining agreement between Dixie Electric Membership Corporation and the Union to employees occupying the chief systems operator and systems operator positions, in the absence of any agreement to the contrary. However, the Board has not authorized or required us to withdraw or eliminate any wage increase or other improved benefits or terms or conditions of employment, which may have already been afforded to the chief systems operator and systems operator positions, as compared to the wages, benefits, and terms, or conditions of employment of bargaining unit employees.

WE WILL notify and, upon request, bargain with the Union in good faith before transferring any work from unit employees to nonunit employees.

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WE WILL make whole any unit employees for any loss of wages and benefits they may have suffered as a result of our unlawful actions and, to the extent the chief systems operator and systems operators lost coverage for various benefits provided under the collective-bargaining agreement, WE

WILL reimburse them for any expenses incurred as a result of their lapse in such coverage.

DIXIE ELECTRIC MEMBERSHIP CORPORATION